IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

PETN,UNDER ARBITRATION ACT. No 52 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HIMALAYA CONSTRUCTION CO.

Versus

INDIAN OIL CORP. LTD.

Appearance:

1. PETN,UNDER ARBITRATION ACT. No. 52 of 2001
MR AR MAJMUDAR for Petitioner No. 1
MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE C.K.BUCH

Date of decision: 25/10/2002

ORAL JUDGEMENT

1. Heard ld. counsel appearing for the parties. Invoking the jurisdiction vested under Section 11 of The Arbitration & Conciliation Act,1996 (hereinafter referred to as the Act), the petitioner has prayed that

petitioner may be permitted to appoint his arbitrator as per clause No.9.0.1.0 and to appoint any one as Arbitrator for the respondent for resolving their disputes and claims referred to in the petition, mainly in para-6 of the petition.

2. As per the averments made in the petition, it is stated that Section 11 notice has been served to the respondent Indian Oil Corporation. However, it has been brought to the notice of this Court by ld. Counsel Ms. Bhatt for respondent Corporation that notice under Section 11 of the Act is served to the General Manager, Gujarat Refinery Division, Indian Oil Corporation, P.O.: Javaharnagar, District : Vadodara, but respondent Corporation is having its registered office at different address and there is no such post of General Manager in the Gujarat Refinery Division of IOC and that is why no formal reply to the notice was given by the Respondent. Otherwise, resistance is very well there and it is found in the reply dated 17.11.2000.

3. Total three different letters were written by the petitioner on 31.8.2000 and same were responded by IOC vide letter dated 17.11.2000. After service of notice, respondent Corporation filed affidavit-in-reply and has resisted the petition from all corners. It is the say of the Corporation that the petitioner has raised final bills of four different respective dates with regard to four different work orders and has received full and final payment. It is the case of the respondent that on receipt of full and final payment, the petitioner issued its No Claim/No Due Certificates in respect of all the four contracts. The petitioner contractor has not raised any direct or indirect protest while accepting the full and final payment. It is not specifically pleaded in the application under Section 11 of the Act that No Claim/No Due Certificates are obtained either under threat or any type of inducement.

4. I have carefully considered the contents of the documents produced by the respondent Corporation which are at page Nos.52 to 57 as annexures to the reply affidavit. It would be beneficial to quote one of the general condition viz. 6.6.4.0 of the deed of contract which goes to the root of the merits of the petition which is at page-70.

"6.6.4.0 : No claim(s) shall on any account be made by the Contractor after the Final Bill, with the intent the Final Bill prepared by the Contractor shall reflect any and all claims whatsoever of the Contractor against the Owner arising out of or in connection with the Contract

or work performed by the Contractor thereunder or relative there to, and the Contractor shall notwithstanding any enabling provisions in any law or Contract and notwithstanding any claim in quantum meruit that the Contractor could have in respect thereof, be deemed to have waived any and all such claims not included in the Final Bill and to have absolved and discharged the Owner from and against the same, even if in not including the same as aforesaid, the Contractor shall have acted under a mistake of law or fact."

5. During the course of arguments, Ms.Bhatt has hammered on the point that the day on which the present petition under Section 11 of the Act was preferred, there was no referable dispute in existence between the parties and all contracts had come to an end on the day on which respondent Corporation received No Claim/ No Due Certificates issued by the petitioner company. In support of her say, she has placed reliance on the decision of the Apex Court in the case of Wild Life Institute of India, Dehradun v/s Vijay Kumar Garg, reported in (1997) 10 SCC 528. In para-5 of the said decision, the Apex Court has observed that:-

"5. Looking to the facts in the present case and the circumstances which are apparent from the correspondence exchanged between the parties in connection with the signing of the receipt of 23.10.1993, it is clear that the final payment was accepted by the respondent in full satisfaction of all his claims under the contract and that there was no dispute outstanding. After the receipt of the said amount also, the respondent has not lodged any protest nor has he alleged any pressure being put upon him for signing the receipt."

Ld. counsel Ms. Bhatt has also placed reliance on the decision of this Court dated 23.8.2002 in IAAP 16/2001 (Mather & Platt (India) Ltd. v/s India Petrochemicals Corporation Ltd.) It is not necessary to reproduce the paras from the above-cited decision, but it is correctly submitted that the ratio of the above-cited decision certainly helps the respondent Corporation.

6. The facts stated in rejoinder affidavit filed by the petitioner are also not convincing that the petitioner allthroughout was waiting for the entire payment from the respondent Corporation and there were six different contracts. I am also not convinced that

there was any scope for negotiations between the parties qua the alleged payment on any day after issuance of No Claim/ No Due Certificates. The petitioner has tried to develope a new case in the rejoinder affidavit alleging that the respondent Corporation withhold the payment of Rs.3,48,622-00 required to be paid to the petitioner. I am also not in agreement to the say of the petitioner that the petition is qua 6 different contracts and not for 4 contracts. Looking to the averments made in the rejoinder affidavit, I am also not convinced that even on the day on which No Claim/ No Due Certificates were signed or any other date, respondent Corporation has not paid a single paise retaining entire amount of compensation i.e. payment with it and contractor is paid for only three Works Orders. These all are afterthought and, therefore, I do not agree that still there is any referable dispute which can be referred to the Arbitrator.

7. It is also important to note that oral submissions of Mr. Majmudar,ld. counsel appearing for the petitioner company is not consistent with the contentions raised in the petition. It is not necessary for the petitioner to apply under Section 11 of the Act that Hon'ble the Chief Justice or Designated Judge should appoint an arbitrator for the petitioner. It is open for the petitioner company to appoint an arbitrator for its side if there is such an agreement. Here, the petitioner Company has attempted to create a dispute joining/creating some stories and the same is found tobe an after-thought.

8. For the reasons aforesaid, there is no merits in this petition and hence the same is dismissed. However, looking to the facts and circumstances of the case, there shall be no order as to costs.

25.10.2002 [C.K. BUCH, J]
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